

ONLINE CHILD SEXUAL ABUSE MATERIAL: PROSECUTING ACROSS JURISDICTIONS

By Lauren R. Shapiro

INTRODUCTION

Information and communication technologies provide a virtual space for atrocities against children to occur through the use, storage, reproduction, and distribution of child sexual abuse and exploitation material in perpetuity and, increasingly, through live streaming of “on-demand” child sexual abuse that has serious consequences in the physical world.¹ Governments have been charged with the responsibility of protecting their minors from abuse and exploitation, which they do by creating laws and policies enforced through criminal justice mechanisms. The International Centre for Missing & Exploited Children (ICMEC) through its “Rule of Law” project provides model legislation to guide

policymakers globally in the task of child protection by using language and concepts that could be applied universally.² While recognizing that countries differ in their cultural, religious, and moral norms, ICMEC defined child sexual abuse material (CSAM, previously called child pornography) as, “any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes.”³

The Internet Watch Foundation confirmed that 51% of the 260,309 reports and 44% of 117 news-groups investigated in 2019 were CSAM, at least 25% higher than in 2018.⁴ Three factors have contributed to the increase in CSAM over the past three years, including (a) concomitant growth in ownership of smartphones (currently 3.5 million users) and other devices for accessing the Internet, even in developing countries (e.g., Philippines, Vietnam); (b) the number of minors given unsupervised, easy access to the Internet; and (c) anonymization methods available for offenders.⁵ The sheer volume of CSAM (estimated in the millions) available for instantaneous distribution and download (as demonstrated by the high number of referrals to National Center for Missing & Exploited Children during the COVID-19 pandemic lock-downs) makes it clear that the task of combating abuse and exploitation of children is simply beyond the ability of any one country.⁶ Instead, a nation’s ability to successfully locate and prosecute offenders of violating child sexual abuse/exploitation material statutes are significant indicators of the strength of its coordination with child protection communities (private and public agencies) across transnational and international jurisdictions and the comprehensive scope of its legislation.

GLOBAL COOPERATION

Despite legal barriers to a “streamlined global response” for combating CSAM, as well as for protecting children from sexual abuse and exploitation, many formal and informal alliances among industry, nongovernmental organizations, and law enforcement agencies have been formed. Child protection organizations make a concerted effort to (1) prevent and disrupt offenders from producing, possessing, accessing, and distributing CSAM; (2) protect

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children from being harmed and helping to locate and rescue those who are currently or have been harmed; (3) punish offenders engaging in CSAM and children sexual abuse and exploitation; and (4) alert law enforcement of emerging patterns (e.g., self-generated sexually explicit material, live-streaming of child sexual abuse) and challenges for eliminating CSAM (e.g., anonymization technologies such as TOR and Virtual Private Networks for online abuse; support for private policy preventing law enforcement from accessing basic subscriber information).⁷ By combining resources, law enforcement around the world work with numerous child protection organizations (e.g., End Child Prostitution and Trafficking/ECPAT; Europol/European Cybercrime Centre, International Centre for Missing & Exploited Children/ICMEC, Internet Watch Foundation/IWF; INHOPE hotlines, Thorn; Virtual Global Taskforce, WeProtect Global Alliance) and other private sector businesses, to eliminate online CSAM. The latter is invaluable to this cause; technology companies provide scanning tools (e.g., image hashing) that detect and differentiate CSAM from non-CSAM; Internet Service Providers (ISPs, electronic communication service providers and remote computing service providers) remove Web sites that host online CSAM; and financial institutions and businesses (e.g., European Financial Coalition Against Commercial Sexual Exploitation of Children Online/EFC; Paypal; Credit Card companies) prevent payment attempts by offenders to purchase CSAM from being processed.⁸ This alliance, however, is dependent upon a shared framework in the legislation developed by each nation in their effort to protect children.

COMPREHENSIVE LEGISLATION

CSAM will flourish when the laws to prevent it are insufficient and/or are not enforced.⁹ International Centre for Missing and Exploited Children (ICMEC) apply five criteria in determining the ability of member countries to provide comprehensive legislation to combat child sexual abuse/exploitation material: “1.) specifies CSAM; 2.) provides definition of CSAM; 3.) criminalizes technology-facilitated CSAM offenses; 4.) criminalizes the knowing possession of CSAM, regardless of the intent to distribute; and 5.) requires ISPs (electronic communication service providers

and remote computing service providers) to report suspected CSAM to law enforcement or to some other mandated agency.”¹⁰ Significant improvements were reported by ICMEC in member countries’ legislation: 22 out of 184 countries met four of the five criteria (an additional five met all five criteria) in 2006, whereas 97 out of 196 countries met four criteria (an additional 21 met all five) in 2018.¹¹ Current obstacles to global disruption to CSAM include legislation deficiencies: 16 countries do not have any CSAM laws (Criterion 1); 51 fail to provide any definition for CSAM (Criterion 2); 25 have no laws relevant to technology-based CSAM (Criterion 3); 38 do not prohibit CSAM possession, regardless of intent to distribute (Criterion 4); and 164 do not require ISP reporting of alleged CSAM to law enforcement or another agency uncovered by content management or user reports (Criterion 5).¹²

OPERATION BLACKWRIST

National and international child protection organizations coordinate with law enforcement across multiple jurisdictions to perform numerous tasks that uncover CSAM, as demonstrated in Operation Blackwrist initiated by INTERPOL in June 2017. Proactive searches on various engines, Web sites and online platforms, chatrooms and discussion forums, and peer-to-peer networks using technology and human content monitors uncover alleged CSAM, initiated primarily by child protective organizations and to a lesser extent by ISPs. During a routine examination of the Darkweb, INTERPOL’s Crimes Against Children unit found CSAM depicting 11 prepubescent male victims that was eventually traced back to a subscription-based Web site, where new CSAM was being posted weekly.¹³ The flagged material triggered notification to law enforcement. INTERPOL’s Liaison Bureau in Bangkok contacted Thailand’s Department of Special Investigations, who in turn coordinated with investigators worldwide to identify and locate site administrators and CSAM victims.¹⁴ Key to any investigation is tracing Web site IP addresses, a task that was performed in this operation by the U.S. Homeland Security Investigations unit hosted in Bulgaria.¹⁵ At the start of this operation in 2017, five countries were involved—Australia, Bulgaria, New Zealand, Thailand, and the United States—and in

the first two years, referrals were made to 60 countries resulting in 50 child victims being rescued. The investigation, as of October 2020, is still ongoing. Despite 12 arrests, law enforcement agents are still trying to identify 100 additional child victims portrayed in the CSAM from this case and to locate other offenders in 137 INTERPOL member countries; their search was extended to known associates of the Web site administrators and users identified through chat rooms and seized devices.¹⁶

To prepare the case for prosecution, investigators ensure that CSAM evidence is preserved and are tasked with locating criminal suspects involved in possession, production, and distribution of CSAM, often by obtaining subscriber information from the ISPs. For this operation, INTERPOL assisted Bulgaria's Cybercrime Department in copying the Web site server and then implemented technology to block CSAM.¹⁷ The New Zealand Department of Internal Affairs assembled profiles of the 63,000 users of the Web site, whereas the US National Center for Missing & Exploited Children cross-checked the user email addresses and provided additional information.¹⁸ The most difficult task, performed over a six-month period for this operation, was identifying the child victims. The process involved comparing the 850,000 images and video files to those of already rescued children and others portrayed in confiscated CSAM stored in INTERPOL's International Child Sexual Exploitation database.¹⁹

The final step involves arresting and prosecuting offenders. Two months after identifying the victims in Thailand, officers arrested the abuser and main administrators of the Web site, Montri Salangam.²⁰ He was charged and found guilty of three charges—child rape, human trafficking, and possession and distribution of CSAM. To demonstrate how underwhelming punishments given to CSAM offenders are in light of their crimes and the harm to their victims, a description of the laws and possible penalties associated with each charge is provided. Salangam's original sentence of 146 years in prison was reduced to 50 years and he was required to pay compensation of only 500,000 baht (\$15,600) to each of five victims (it was never explained why the other six victims received nothing).

In Thailand, there are two statutes that could be used to charge offenders with *child rape*. Penal Code Section 277 covers offenses related to sexual abuse

and assault against children and penalties are higher when the children are under age 13, as was true of all 11 victims in this case (7–20 years imprisonment and a fine between 1400 and 40000 baht).²¹ The Child Protection Act, B.E. 2546, Chapter 2 Treatment of the Child, Section 26, prohibits (1) acts resulting in torturing a child's body or mind, (6) use, employ, or ask a child to act in such a way that might be physically or mentally harmful to the child, (7) force...a child to commit any acts indicative of commercial exploitation in a manner which ... constitutes an act of torture against the child, and (9) force...a child to perform or act in a pornographic manner, regardless of whether the intention is to obtain remuneration.²²

The charge of *human trafficking* is covered under the Anti-Trafficking Act (comprised of the Prevention and Suppression of Human Trafficking Act, 2008 B.E. 2441, 2015 B.E. 2558 and 2017 B.E. 2560) under Sections 6 & 52 prohibiting the use of children 'for the purpose of sexual exploitation' and which would carry higher penalties as all of the victims were under 15 (8–15 years imprisonment and fines of 160000–300000 baht).²³ Salangam had lured his nephew and the other victims by offering food, football games, and Internet access.²⁴ In accordance with Penal Code Section 282, luring children for the purpose of trafficking them to commit indecent sexual acts or for another's sexual gratification is prohibited and is punishable by 5-20 years imprisonment and fines up to 40000 Baht when victims are under 15.²⁵

As for the final charges of *possession and distribution of CSAM*, Thailand does not actually prohibit CSAM per se. Instead, Salangam could have been prosecuted for possessing and distributing obscenity under Title IX Offence Relating to Sexuality of Penal Code Section 287(1), which prohibits conduct related to production, possession (only if for trade/public distribution/public flaunting), import/export, and circulation of obscene materials, the penalty of which is up to 3 years imprisonment and/or a fine not to exceed 6000 baht.²⁶ Alternatively, he may have been charged for exploitation under Section 4 of the Anti-Trafficking Act (2551), given that he benefited from the production or distribution of pornographic materials or other forms of sexual exploitation.²⁷

In January 2018, Australian Federal Police, South Australian Police, and Joint Anti-Child Exploitation Team arrested two South Australian citizens—Ruecha Toputza, identified as the secondary

administrator of the illegal Web site and his long-term associate, Suthipong Salesongsom.²⁸ By combing through 900,000 CSAM images of Thailand and Australian victims, officers determined he abused 13 children in Adelaide and Thailand from June 2011 until his arrest, one as young as 15 months of age.²⁹ Tokputza pled guilty to 50 charges of aggravated indecent assault, unlawful sexual intercourse with a person under the age of 14, sex with children outside of Australia, persistent exploitation of a child outside Australia, and transmitting CSAM (he had 12500 images and 650 videos) and was sentenced to 40 years and three months (non-parole period of 28 years).³⁰ Suthipong Salesongsom engaged in abuse of the same children alone or with Tokputza, and was sentenced to 36.5 years.³¹

Two of the charges—*aggravated indecent assault* and *unlawful sexual intercourse*— would have been prosecuted under the Criminal Law Consolidation Act 1935 (SA).³² Aggravated indecent assault (s 56) involving a victim less than 14 years old is liable for a maximum of 10-year imprisonment. Unlawful sexual intercourse (s 49(1)) with a person under the age of 14 carries a maximum penalty of life imprisonment. Charges for crimes that occurred outside of Southern Australia would have been prosecuted under the Commonwealth Criminal Code Act 1995 (Sexual Crimes Against Children), as modified by the Combatting Child Sexual Exploitation Legislation Amendment Act 2019.³³ Division 272 Child sex offenses outside Australia, Subdivision B, 272.8 prohibits *sexual intercourse with children outside of Australia* (maximum 25 years imprisonment) and Section 272.11 prohibits *persistent exploitation of a child*, defined as involving the same person on two or more separate occasions (maximum 30 years imprisonment). In regard to the offense of *transmitting CSAM*, both offenders were likely charged with violating Consolidation Act 1935 (SA) s 63AB(1) dealing with CSAM [s 62] which “includes making the material available for viewing, uploading, downloading, or streaming; facilitating the viewing, downloading or streaming of the material; and viewing, uploading downloading, or streaming of the material” and has a maximum penalty of 10 years imprisonment.³⁴

It is likely that other charges were removed in exchange for guilty pleas. In light of the description provided by Interpol, additional offenses could have been charged for violating Criminal Law

Consolidation Act 1935 (SA), including s 63AB(1) for *administering a website* [s 63] carries maximum 10-year imprisonment; *possession of child exploitation material* [s 63A (1)] aggravated (first) offense as the victims were under age 14 carries maximum 7 years imprisonment; *production of child exploitation material* [s 63] aggravated offense carries maximum 12 years imprisonment; and *procuring child to commit indecent act* [s 63B(1)] aggravated offense carries maximum 12 years imprisonment.³⁵ Alternatively, charges for possession and production of CSAM (Subdivision D—Offenses relating to the use of carriage service for child abuse material, Section 473.1, 474.22, 4474.22A, 74.23) of CSAM could have been made under Criminal Code Act 1995 (Sexual Crimes Against Children). Under CC 1995, they could have been charged with *procuring a child to engage in sexual activity outside of Australia*, which is a violation of 272.14 (maximum 15-year imprisonment penalty).³⁶

The first U.S. conviction associated with Operation Blackwrist was for Charles Orange, a registered sex offender convicted in 2008 for Indecency with a Child (Texas Penal Code, Section 21.02(c) (2)).³⁷ The search warrant, executed in 2018 based on an analyst’s determination that Orange was a subscriber to the CSAM Web site through his email address, Internet history, and Internet Protocol (IP) address, yielded a device containing CSAM. He was arrested, prosecuted, and convicted in 2019 and faces a sentence of 10 to 20 years for possession of CSAM.³⁸ Most likely, Orange was charged with violating 18 U.S.C. § 2252, which prohibits possession, receipt, and transportation of child pornography in interstate or foreign commerce (*i.e.*, U.S. mail, carriers, Internet, computer download of image for storage).³⁹ Each charge carries a maximum sentence of 20 years imprisonment when the visual depiction involved in the offense is a prepubescent minor under 12 years of age, and the minimum sentence is 10 years when the offender has previous convictions under the laws of any State related to sexual abuse involving a minor.⁴⁰

CONCLUSION

Technology allows CSAM to cross borders with impunity, but it is still possible to protect children. As shown in the described coordination among the child protective community and application of current

legislation in *Operation Blackwrist*, CSAM offenders were located and prosecuted across multiple jurisdictions. Combatting CSAM, most importantly the tasks leading up to and including building cases against offenders, simply could not be done without support from the child protection organizations. But it is a long, time-consuming process which means that child victims are subjected to abuse for years before they are rescued? Although the laws in Thailand, Australia, and the United States proved to be adequate for prosecuting offenders, this may not be true for each of the other 137 countries handling referrals from this operation due to various issues already raised (e.g., CSAM definition). It is important that the UN member countries work together to close the gap in legislative differences that may allow offenders to escape desired penalties. Finally, countries may need to reconsider whether justice is served by examining sentence lengths of convicted offenders and the amount of fines paid as remuneration. In particular, the consequences for the crimes committed against the 50 (plus) child victims in *Operation Blackwrist* seem underwhelming given the amount of physical and mental health damage imposed on them.

NOTES

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